IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FERLANDO ESCO — APPELLANT

VS. — NO. 2006-KA-1787

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SUMMARY OF THE ARGUMENT

The rule of completeness allows the admission of Johnson's entire plea colloquy where Esco challenged Johnson's credibility, attempting to impeach him by suggesting that his testimony was a recent fabrication to avoid a harsh sentence. Further, the trial court made a specific finding that there was nothing in the statement beyond the specific issues raised on cross other than the portion wherein Johnson was advised of his rights. Esco cannot show any prejudice due to the admission of Johnson's plea colloquy. Esco's counsel never requested an instruction limiting the jury's consideration of the prior consistent statement by Johnson. The trial court cannot be held in error on an issue that was never presented to the trial judge. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived. Therefore, this issue is procedurally barred on appeal. Further, the prosecution's case in the trial court was strong and the jury was clearly instructed regarding its task in judging the credibility of witnesses and weighing the testimony and evidence in the case. There is no evidence that anything in the colloquy prejudiced Esco in any way. The trial court specifically found that the remaining testimony in the plea related to Johnson being advised of his rights. This issue is without merit and the verdict of the trial court should be upheld.

The evidence of Esco's prior conviction for strong armed robbery was not admitted pursuant to M.R.E. 609 for purposes of impeachment, but rather as a material element of the crime. Rule 609 plainly states that its provisions are "[f]or the purposes of attacking the credibility of a witness. There is no precedent for applying M.R.E. 609 or the Peterson factors in a case where a conviction for a prior crime is an element of proof of the crime for which the

defendant is being tried. The case of *Old Chief* is not controlling law in the instant case. The Supreme Court's decision was not based on constitutional principles which would be binding on the states, but instead was based on the specific language of 18 U.S.C. § 922. There are no Mississippi cases adopting the holding in *Old Chief* to require that evidence of prior felonies admitted to prove the material elements of the crime of possession of a firearm by a convicted felon be subjected to a 403 balancing test or a Peterson hearing. This issue is without precedent and without merit.

Esco's counsel never requested an instruction limiting the jury's consideration of Johnson's prior convictions. The trial court cannot be held in error on an issue that was never presented to the trial judge. The first point that must be addressed is that appellant Franklin did not object or raise this issue at trial. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived.

The trial court did not err in overruling the defense's objection to the prosecutor's cross examination of Esco. This issue is procedurally barred, since Esco cites no relevant Mississippi authority for this proposition. Further, there is no prohibition again asking a witness who contradicts other witnesses about the discrepancy. It is the purpose of cross examination to point out such discrepancies. Esco failed to object to the rebuttal testimony of any of the officers. Where a defendant fails to contemporaneously object at trial, he is procedurally barred from raising the issue on appeal. *Boggan v. State*, 894 So.2d 581 (Miss.Ct. App.2004). Further, the prosecution carries the burden of proving it's case and where the defendant accuses the prosecution's witnesses of lying, it is proper to allow those witnesses to rebut that accusation. The prosecution has the opportunity for rebuttal specifically for the purpose of rebutting the

defendant's testimony and carrying it's burden of proof. Here, the defendant testified that the prosecution witnesses were lying and the prosecution had a right to rebut that testimony. Because Brown was present to testify as to the contents of the list, where it came from, how it was made, there is no error in producing it at trial. The list was made in the course of his regular duties and was a record kept in the ordinary course of business of the City of Madison Police Department. M.R.E. 803 (6) It is a record of the incoming and outgoing calls made on a cell phone that was taken into evidence by the Madison County Police Department. It is certainly the usual practice of police investigators and in the ordinary course of business to make a record of the data contained in a piece of evidence to a crime. Officer Brown's testimony that he listed the information made the list himself and had verified the list provided the foundation for it's admission since he was clearly in the course of his regular duties as a police officer when he made the record. It is therefore admissible into evidence and was properly introduced through Officer Brown.

The Mississippi Court of Appeals has held that the radio log of an emergency call from jewelry store, which contained information describing robber, location of robbery, and location and description of the car in which robber fled, and described what law enforcement officers perceived and what actions they took following report of the robbery, was admissible in robbery prosecution under business records exception to hearsay rule; communications supervisor of police department testified that it was customary for police department to prepare radio log during emergency call, and radio log was a record of regularly conducted business activity. Rules of Evid., Rule 803(6). *Cabrere v. State*, 920 So.2d 1062 (Miss.Ct. App.,2006)

Esco objects to the admission of a list of incoming and outgoing calls which was recorded

from his cellphone by Officer Brown as a part of the investigation of the crime. Esco asserts that the list is inadmissible hearsay. If there was error in admitting this list, it is harmless error, since the officer who made the list was available for cross examination and there are no indicia of untrustworthiness as to this piece of evidence. Because Brown was present to testify as to the contents of the list, where it came from, how it was made, there is no error in producing it at trial. Further, the list is a regularly kept record of the police department. It was made in the course of Brown's regular duties and was a record kept in the ordinary course of business of the City of Madison Police Department. M.R.E. 803 (6) It is a record of the incoming and outgoing calls made on a cell phone that was taken into evidence by the Madison County Police Department. It is certainly the usual practice of police investigators and in the ordinary course of business to make a record of the data contained in a piece of evidence to a crime. Officer Brown's testimony that he listed the information made the list himself and had verified the list provided the foundation for it's admission since he was clearly in the course of his regular duties as a police officer when he made the record. It is therefore admissible into evidence and was properly introduced through Officer Brown.

There is no basis in the record for Esco's suggestion that the trial judge was influenced by anything the jurors might have said when he visited with them after the verdict was rendered. There is nothing about Esco's sentences that is improper, since each sentence is within the statutory time frames. Further, the trial court was lenient in providing that the sentences for Counts 1-5 would run concurrently. The comments by the judge cited in Esco's brief reference the apparent fear of the potential jurors during voir dire. (Tr. 754.) The judge does not mention any reaction by the jurors post-verdict, which is the time frame of the visit about which Esco

complains. There is no indication that Esco was prejudiced in any way or that anything improper occurred. There was no objection to the visit by Esco's trial counsel and no request for any information about the visit afterwards. Esco's trial counsel did not ask if the trial court was improperly using information gained from jurors after the verdict. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived. *Carr v. State*, 655 So.2d 824, 832 (Miss.1995); *Pittman v. State*, 297 So.2d 888, 892 (Miss.1974). Therefore, this issue is procedurally barred on appeal. There is nothing in the record to support this claim. Further, This issue is procedurally barred, since Esco cites no relevant Mississippi authority for this proposition. *Bell v. State*, 879 So.2d 423, 434 (Miss.2004) ("Failure to cite relevant authority obviates the appellate court's obligation to review such issues.").

As argued above, all Esco's issues presented on appeal are without merit. Where no error is found, there can be no cumulative error. As his final issue, Esco argues that he is entitled to relief based on the cumulative effect of errors. The Mississippi Supreme Court has held "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." *Wilburn v. State*, 608 So.2d 702, 705 (Miss.1992).

ARGUMENT

I. The trial court did not err when it allowed the prosecution to introduce the prior consistent statement of Michael Johnson.

This Court's standard of review as to the relevance and admissibility of evidence during trial is well established. "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Weaver v. State*, 713 So.2d 860, 865 (Miss.1997) (citations omitted).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter" and is generally not admissible at trial. M.R.E. 801(c); M.R.E. 802. One exception to the general rule barring hearsay testimony is found in Mississippi Rule of Evidence 801(d)(1)(B). Rule 801(d)(1)(B) permits the introduction of a prior consistent statement if (1) the declarant has testified at the trial and been subject to cross-examination, (2) the testimony of the witness as to the prior statement was consistent with the declarant's testimony as a witness, (3) the prior statement was offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Each of the prerequisites of Rule 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay. Therefore, because evidence of a prior consistent statement is not hearsay if the statement fits the definition of Rule 801(d)(1)(B), such a statement would ordinarily be very "relevant evidence" as defined in Rule 401 of the Mississippi Rules of Evidence and thus, the statement becomes admissible under Rule 402. The trial judge properly allowed the State to introduce Michael Johnson's plea colloquy as a

prior consistent statement in order to rebut the defense's attempt to impeach Johnson using his plea colloquy. Accordingly, the trial court did not err in admitting Johnson's prior consistent statements made during his plea colloquy.

It was proper to admit Johnson's complete plea colloquy based on the rule of completeness. A prior consistent statement can be so selectively used as to appear inconsistent. Mississippi Evidence Rule 106, Remainder of or Related Writings or Recorded Statements, states that [w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. The comment to the Rule calls this "a codification of the common law doctrine of completeness .... The rule only applies the doctrine of completeness to written or recorded statements of a specific document." M.R.E. 106 cmt.

In *Washington v. State*, Michael Washington questioned Luke extensively about portions of each report favorable to his case, and his co-defendant, Timothy Washington, introduced one of the NCIB inspection reports into evidence. Only then did the State move to admit the remaining reports into evidence in order to give the jury a complete picture. See the comment to Rule 106 which states: "Such a rule attempts to prevent misleading the jury by taking evidence out of context." *Washington v. State*, 726 So.2d 209, 216 (Miss.App.1998). Even if "Rule 106 does not necessarily require that all the remainder of a document" be admitted, it does not bar admission of "that part which 'ought in fairness to be considered.' " *Id.* That is the purpose of Rule 106, that in order to "minimize the inaccuracy of an incomplete presentation of a record, ... trial courts have the power to determine whether 'fairness' requires the proponent to introduce the

whole writing" as relevant to the issues of the case. Moreover even if evidence is otherwise inadmissible, one party can open the door to its admission. *Washington*, 726 So.2d at 216 (citing *Crenshaw v. State*, 520 So.2d 131, 133 (Miss.1988)).

A prior consistent statement "need not be 'identical in every detail' to the trial testimony to be considered 'consistent.' The test of admissibility is whether a reasonable mind would accept the central thrust of the prior statement as being consistent with the witness's in-court testimony." Using the actual statement that is considered consistent, the Esco implicitly charged that what was saying on the stand was different than what Johnson said at the time of his plea bargain. That implies recent fabrication. So long as the central thrust of the prior statement is consistent with the trial testimony, it is a prior consistent statement even if the cross-examining attorney was attempting to show that it was not.

Through the plea transcript, the Esco's attorney tried to impeach Johnson regarding several details of the testimony, including type of gun, who had the gun and the details of where Esco and Johnson met that day. This line of questioning was preceded by a generalized attempt by the defense to suggest that Johnson was untruthful in his statement to the prosecution by noting that he had not implicated Esco prior to the entry of his guilty plea, and that he did not change his plea to guilty until he learned that Isaiah Sanders received a sentence of forty years. By this line of questioning, the defense attempted to suggest that Johnson was giving untruthful testimony in order to receive a lighter sentence. The defense asked specific questions regarding the plea colloquy about the kind of gun used in the crime and the details about when Johnson and Esco met on the day of the crime. While the specific questions asked from the plea document were limited in scope, the cross examination in it's totality challenged the entire plea colloquy.

The nature of the plea colloquy was called into question when Johnson was asked whether he offered information about meeting Esco at Target on the morning of the crime. The plea colloquy was given as responses to specific questions, and additional narrative testimony was not requested or given. Johnson was not asked for specific details until a few days prior to Esco's trial at which time he gave those details.

On redirect, the State moved for the admission of the entire plea colloquy into evidence based on the Rule of Completeness, stated in M.R.E. 801 (d)(1), "If a declarant who testifies at trial or hearing is subject to cross examination concerning the statement, and the statement is consistent with this testimony and is offered to rebut and express or implied charge against him, the recent fabrication or improper influence or motive." Defense challenged not just the details of the kind of gun or where the parties met, but suggested an improper influence or motive for the entire narrative, including the naming of Ferlando Esco as a participant. The trial court reviewed the colloquy and determined that the only non-related issues in the colloquy were the statements made by the Court advising Johnson of his rights. The trial court specifically found that there was nothing prejudicial in the plea colloquy and admitted the document into evidence.

Esco is unable to show any prejudice due to the admission of Johnson's plea colloquy. Esco broadly states that admission of the plea colloquy bolsters Johnson's testimony, but does not offer any specific statements from the plea colloquy that are unrelated to the cross examination regarding the colloquy that bolster Johnson's testimony or prejudice Esco in any way.

The trial court is entitled to great deference regarding admission of evidence. This issue is without merit and the trial court's ruling should be upheld.

II. The trial court did not err by failing to instruct the jury that the prior consistent statement by Johnson should not be considered as substantive testimony.

Esco's counsel never requested an instruction limiting the jury's consideration of the prior consistent statement by Johnson. The trial court cannot be held in error on an issue that was never presented to the trial judge. The first point that must be addressed is that appellant Franklin did not object or raise this issue at trial. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived. *Carr v. State*, 655 So.2d 824, 832 (Miss.1995); *Pittman v. State*, 297 So.2d 888, 892 (Miss.1974). Therefore, this issue is procedurally barred on appeal.

Esco cites *Moore v. State* for the proposition that it is "plain error" for a trial court to allow admission of Johnson's prior consistent statement without instructing the jury to use the statement for impeachment purposes only. However, *Jackson v.* State, 885 So.2d 723 (Miss.Ct.App. 2004), is more appropriately applied in the instant case. Jackson asserted that the trial court erred in failing to give an instruction that a witnesses prior inconsistent statement could not be used as evidence. As in the instant case, Jackson did not request a limiting instruction. In *Jackson*, the Court of Appeals opined as follows:

> In *Russell v.State*, 607 So.2d 1107, 1117 (Miss. 1992), the Mississippi Supreme Court held that failure to request a jury instruction renders the issue moot on appeal. Jackson relies on *Moore v. State*, 755 So.2d 1276 (Miss.Ct.App. 2000), in which this Court reversed finding plain error in the lack of an instruction that was not requested at trial. In *Moore*, this Court found that without the inconsistent statements the evidence was severely diminished. *Moore*, 755 So.2d at 1280. It was noted that the evidence was "weak and alone may be insufficient to connect Moore to the crime spree." Id. The Court therefore found that Moore was denied his fundamental right to a fair trial.

> Moore is a different situation than the case at bar. Jackson's connection with the cocaine and its constructive sale was established through the testimony of the undercover agent. The State's case was much stronger than the case in Moore. The trial judge instructed the jury regarding the credibility of witnesses and that it was its task to weight the testimony and evidence in the case. An instruction such as this has been held to be sufficient to meet any requirement of an instruction in the instance of an inconsistent statement. *Swann v. State*, 806 So.2d 1111, 1117 (Miss. 2002). Error, if any, was harmless. This issue is without merit.
>
> *Jackson v. State*, 885 So.2d

As in *Jackson*, the prosecution's case in the trial court was strong and the jury was clearly instructed regarding its task in judging the credibility of witnesses and weighing the testimony and evidence in the case. (Tr. 51-52) Further, there is no evidence that anything in the colloquy prejudiced Esco in any way. The trial court specifically found that the remaining testimony in the plea related to Johnson being advised of his rights. This issue is without merit and the verdict of the trial court should be upheld.

III. The trial court did not err in allowing the prosecution to introduce a 1991 conviction for strong arm robbery without applying the Peterson factors since the conviction was admitted as an element of proof of the crime of convicted felon in possession of a firearm .

The evidence of Esco's prior conviction for strong armed robbery was not admitted pursuant to M.R.E. 609 for purposes of impeachment, but rather as a material element of the crime. Rule 609 plainly states that its provisions are "[f]or the purposes of attacking the credibility of a witness. There is no precedent for applying M.R.E. 609 or the Peterson factors in a case where a conviction for a prior crime is an element of proof of the crime for which the defendant is being tried. The case of *Old Chief* is not controlling law in the instant case. The Supreme Court's decision was not based on constitutional principles which would be binding on

the states, but instead was based on the specific language of 18 U.S.C. § 922. There are no Mississippi cases adopting the holding in *Old Chief* to require that evidence of prior felonies admitted to prove the material elements of the crime of possession of a firearm by a convicted felon be subjected to a 403 balancing test or a Peterson hearing. This issue is without precedent and without merit.

IV. The trial judge did not err by not giving a sua sponte limiting instruction regarding evidence of Esco's prior convictions.

Esco's counsel never requested an instruction limiting the jury's consideration of Johnson's prior convictions. The trial court cannot be held in error on an issue that was never presented to the trial judge. The first point that must be addressed is that appellant Franklin did not object or raise this issue at trial. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived. *Carr v. State*, 655 So.2d 824, 832 (Miss.1995); *Pittman v. State*, 297 So.2d 888, 892 (Miss.1974). Therefore, this issue is procedurally barred on appeal.

In *Williams v. State*, 819 So.2d 532 (Miss.Ct.App.2001), the Mississippi Court of Appeals held that:

> Rather, the evidence was admitted to prove an element of the crime "felon in possession of a firearm." Therefore, the correct law to be used is found in *Nettles v. State*, 380 So.2d 246 (Miss.1980). The court stated in this case that, concerning past criminal activity evidence admitted to prove an element of a crime , a sua sponte instruction is not necessary unless the "totality" of the circumstances call for it. Id. at 247. This totality is based on all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors. Id.

> The State did not delve into Williams's past. It merely stated that Williams had been previously convicted on burglary and robbery charges. This did not overly prejudice Williams. More importantly, the overwhelming weight of the evidence supported the guilty verdict. He was identified by the witnesses of the crime, the stolen property was either found on his person or within his residence, and the police found a chrome pistol matching the one used in the robbery within easy reach of Williams. Therefore, based on the factors set forth in Nettles, this Court finds that a sua sponte instruction was not required in this case.
>
> *Williams v. State*, 819 So.2d 532 (Miss.Ct.App.2001)

There is no error. This issue is without merit and should be dismissed.

V. The trial court did not err in overruling the defense's objection to the prosecutor's cross examination of Esco.

This issue is procedurally barred, since Esco cites no relevant Mississippi authority for this proposition. *Bell v. State*, 879 So.2d 423, 434 (Miss.2004) ("Failure to cite relevant authority obviates the appellate court's obligation to review such issues.").

Procedural bar notwithstanding, this issue is without substantive merit. When Esco testified that he did not tell Officer Scott Young that he was driving a girl's car because she was driving his truck, the prosecutor asked him if Officer Young was lying when he testified that Esco had made that statement to him. Esco argues that this question was improper and invaded the province of the jury. However, Esco cites no applicable case law for this proposition. Hart, which Esco cites for the proposition that a witness cannot give an opinion as to the truthfulness of another witness's statements is completely inapplicable since it is based on M.R.E. 608 governing the admissibility of *expert* witness testimony. Here the issue is cross examination of the defendant and does not involve expert testimony.

Esco argues that the questions make him "look bad". Indeed, cross-examination is intended to point out discrepancies and to make the defendant "look bad". This is perfectly appropriate cross examination of a witness who is contradicting multiple other witnesses. Under Mississippi law, there is no prohibition of questions that highlight the determination the jury must make – which witnesses are more credible. The jury still had the duty of determining who was credible and was clearly instructed regarding that task. There is no error. Further, Esco cites no relevant authority for this proposition, so the issue is procedurally barred. *Bell v. State*, 879 So.2d 423, 434 (Miss.2004) ("Failure to cite relevant authority obviates the appellate court's obligation to review such issues.").

VI. Esco received a fair and impartial trial and it was proper for the prosecution to ask law enforcement officers on rebuttal whether they testified truthfully during the State's case in chief where the defendant accused the officers of lying during that testimony.

Esco failed to object to the rebuttal testimony of any of the officers. Where a defendant fails to contemporaneously object at trial, he is procedurally barred from raising the issue on appeal. *Boggan v. State*, 894 So.2d 581 (Miss.Ct. App.2004). Further, the prosecution carries the burden of proving it's case and where the defendant accuses the prosecution's witnesses of lying, it is proper to allow those witnesses to rebut that accusation. The prosecution has the opportunity for rebuttal specifically for the purpose of rebutting the defendant's testimony and carrying it's burden of proof. Here, the defendant testified that the prosecution witnesses were lying and the prosecution had a right to rebut that testimony.

VII. The trial court correctly allowed the prosecution to introduce the list made by Officer Brown of all incoming and outgoing phone calls from the phone used by Ferlando Esco on the day of the crime.

The standard of review we must employ concerning the admission or exclusion of evidence is well settled. "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, [this] Court will not reverse [the] ruling." *Shaw v. State*, 915 So.2d 442, 445 (Miss.2005).

Esco objects to the admission of a list of incoming and outgoing calls which was recorded from his cellphone by Officer Brown as a part of the investigation of the crime. Esco asserts that the list is inadmissible hearsay. However, because Brown was present to testify as to the contents of the list, where it came from, how it was made, there is no error in producing it at trial. Further, the list is a regularly kept record of the police department. It was made in the course of Brown's regular duties and was a record kept in the ordinary course of business of the City of Madison Police Department. M.R.E. 803 (6) It is a record of the incoming and outgoing calls made on a cell phone that was taken into evidence by the Madison County Police Department. It is certainly the usual practice of police investigators and in the ordinary course of business to make a record of the data contained in a piece of evidence to a crime. Officer Brown's testimony that he listed the information made the list himself and had verified the list provided the foundation for it's admission since he was clearly in the course of his regular duties as a police officer when he made the record. It is therefore admissible into evidence and was properly introduced through Officer Brown.

The Mississippi Court of Appeals has held that a handwritten radio log of an emergency call from jewelry store, which contained information describing robber, location of robbery, and location and description of the car in which robber fled, and described what law enforcement

officers perceived and what actions they took following report of the robbery, was admissible in robbery prosecution under business records exception to hearsay rule; communications supervisor of police department testified that it was customary for police department to prepare radio log during emergency call, and radio log was a record of regularly conducted business activity. Rules of Evid., Rule 803(6). *Cabrere v. State*, 920 So.2d 1062 (Miss.Ct. App.,2006)

If there was error in admitting this list, it is harmless error, since the officer who made the list was available for cross examination and there are no indicia of untrustworthiness as to this piece of evidence.

VIII. The trial court did not err in visiting with the jury prior to pronouncing sentence.

There is no basis in the record for Esco's suggestion that the trial judge was influenced by anything the jurors might have said when he visited with them after the verdict was rendered. There is nothing about Esco's sentences that is improper, since each sentence is within the statutory time frames. Further, the trial court was lenient in providing that the sentences for Counts 1-5 would run concurrently. The comments by the judge cited in Esco's brief reference the apparent fear of the potential jurors during voir dire. (Tr. 754.) The judge does not mention any reaction by the jurors post-verdict, which is the time frame of the visit about which Esco complains. There is no indication that Esco was prejudiced in any way or that anything improper occurred. There was no objection to the visit by Esco's trial counsel and no request for any information about the visit afterwards. Esco's trial counsel did not ask if the trial court was improperly using information gained from jurors after the verdict. When no contemporaneous objection is made, the right to raise a point on appeal is not preserved, and the error, if any, is waived. *Carr v. State*, 655 So.2d 824, 832 (Miss.1995); *Pittman v. State*, 297 So.2d 888, 892

(Miss.1974). Therefore, this issue is procedurally barred on appeal. There is nothing in the record to support this claim. Further, This issue is procedurally barred, since Esco cites no relevant Mississippi authority for this proposition. *Bell v. State*, 879 So.2d 423, 434 (Miss.2004) ("Failure to cite relevant authority obviates the appellate court's obligation to review such issues.").

IX. Where no error is found in the court below, there can be no cumulative error.

As argued above, all Esco's issues presented on appeal are without merit. Where no error is found, there can be no cumulative error. As his final issue, Esco argues that he is entitled to relief based on the cumulative effect of errors. The Mississippi Supreme Court has held "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." *Wilburn v. State*, 608 So.2d 702, 705 (Miss.1992).

An analysis of cumulative error must be based on the fact that each error found on appeal, standing alone, did not produce an unfair trial, but when evaluated cumulatively did produce an unfair trial. *Id.* However, for there to be a cumulative effect it must be found that there were multiple errors at trial. *Sheffield v. State*, 844 So.2d 519, 525 (Miss.Ct.App.2003). Esco's prior assignments of error are without merit, therefore there can be no cumulative error.

CONCLUSION

Esco's assignments of error are without merit and the verdict of the jury and judgments of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 22 day of January, 2008.

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